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Before the
Federal Communications Commission
 Washington, DC

NOV 30 2001

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Amendment of Section 202(b),)
 Table of Allotments,)
 FM Broadcast Stations)
 (Barnwell, South Carolina and Pembroke,)
 Douglas and Willacoochee, Georgia;)
 Statesboro, Pulaski, East Dublin,)
 Swainsboro, Twin City, Georgia))
)
 To: **Chief, Allocations Branch**)

MM Docket No. 00-18 /
 RM-9790

REPLY TO OPPOSITION

Multi-Service Corp. ("Multi-Service"), by its attorney, hereby submits its reply to the "Opposition to Petition for Reconsideration" ("Opposition") filed by Bullie Broadcasting Corporation ("Bullie") with respect to the "Petition for Reconsideration" filed by Multi-Service of the *Report and Order*, DA 01-2316 (rel. Oct. 5, 2001), substituting Channel 257C1 for Channel 256C3 at Barnwell, South Carolina, and reallocating WBAW-FM, Channel 257C1 to Pembroke, Georgia. With respect thereto, the following is stated:

As Bullie concedes, due to the fact that Station WBUB(AM), Barnwell, South Carolina, has been deleted, Barnwell currently has no locally licensed service other than WBAW-FM. Therefore, were WBAW-FM, Barnwell, South Carolina immediately to change its city of license to Pembroke, Georgia, it would deprive Barnwell of any locally licensed service. Admittedly, Channel 256C3 is being allotted as a "backfill" allotment, and Bullie has committed to applying for that channel. However, that allotment does not constitute replacement "service" until such time as the allotment is associated with a construction permit, the construction permit is

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constructed, and an underlying station operating on the allotment begins operation.¹

In these circumstances, Commission precedent is clear. In *Refugio and Taft, TX*, 15 FCC Rcd 8497 (MMB 2000), a petitioner requested a change in city of license, and proposed a “backfill” allotment at the community it was departing, stating its willingness to file an application for the channel should the channel be made available. *Id* at ¶ 6. The city of license change was approved, but was conditioned:

To ensure that local service will continue to be provided to Refugio, we will condition the grant of an authorization to operate Station KTKY on Channel 293C2 at Taft upon activation of service at Refugio either on Channel 263A or 291A. See *Llano and Marble Falls, TX*, 12 FCC Rcd 809 (1997). In comments, Pacific has requested that activation of Channel 293C2 at Taft not be conditioned on commencement of service at Refugio. Pacific states that it is not backing away from its commitment to provide local service at Refugio but is concerned with the possible delay in providing service to the community of Taft as service may be delayed for years at Refugio if the frequencies are required to be awarded by way of auction. We deny Pacific's request. **The Commission has specifically stated that the public has a legitimate expectation that existing service will continue, and that this expectation is a factor to be weighed independently against the service benefits that may result from reallocating a channel. We have weighed the factors and are granting Pacific's reallocation request because of the public interest benefits of providing first local service to both Taft and Refugio. However, we are compelled to condition the the reallocation of Channel 293C2 to Taft on activation of a channel at Refugio to insure continued service at Refugio.**

Id. (emphasis added; footnotes omitted).

Where a sole local operation station is being removed, the Commission has conditioned grant of the change of city of license on the *activation* of whatever allotted channel was allotted but not yet operating. See, e.g., *Llano and Marble Falls, TX*, 12 FCC Rcd 6809 (MMB 1997).

¹ See, e.g., *Olney, Archer, Denison-Sherman and Azle, TX and Lawton, OK*, 13 FCC Rcd 18920, ¶ 4 (MMB 1998) (“we recognize that a removal of a sole local service...is not obviated by the allotment of a vacant channel”).

The sole exception to this rule was presented in *Rangley, Silverton and Ridgeway, CO*, 15 FCC Rcd 18266 (MMB 2000), where the station changing cities of license was not on the air. *Id.* at ¶ 6 (“We recognize that a removal of a sole local service from Silverton is not obviated by the allotment of a vacant channel. However, in this instance, Station KBNG is not on the air”). Insofar as Station WBAW-FM is an operating station, that exception is not applicable in this case. It is not sufficient, as Bullie suggests, for Bullie simply to have given a “commitment to apply” for the channel. Opposition at 7. As in *Refugio*, operations on the now-vacant channel must *begin* before the channel change may be implemented.

In this case, evidently due to the Commission’s failure to be informed that WBUB(AM) no longer was licensed or operating at Barnwell, the Commission failed to condition its grant in a manner consistent with past policy. Therefore, clearly, under existing policy, at the very least, a condition should be added to the grant of Bullie’s rulemaking proposal as follows:

(c) Operation of Station WBAW-FM on Channel 257C1 in Pembroke, Georgia, including program test operation pursuant to Section 73.1620, will not be commenced until such time as express authorization from the Commission has been granted. Such authorization will not be granted until a construction permit has been issued for Channel 256C3 at Barnwell, South Carolina, and activation of service has been initiated on Channel 256C3 at Barnwell.

See, e.g., id. at ¶ 9.

As to the other arguments made by Bullie, the arguments must be rejected. In *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990), the Commission addressed the removal of a sole local service from a community as “presumptively” diserving the public interest. As the Commission has stated, “in general, we do not believe that the public interest would be served by removing a community’s sole local transmission service merely to provide a

first local transmission service to another community.” See *Ardmore, Oklahoma, and Sherman, Texas*, 6 FCC Rcd 7006, ¶ 7 (1991). The underpinning for this policy is that the public has a legitimate expectation that existing local service will continue. In this connection, the Commission stated that a vacant allotment or unbuilt construction permit does not adequately cure a disruption of this service. See *Change of Community Order*, 5 FCC Rcd at 7097, ¶ 19 (1990) (vacant allotments or unconstructed construction permits are not considered to be existing services for change of community proceedings under Section 1.420(i) of the Commission's Rules).² Thus, under Commission policy, in order to qualify for an unconditional change of city of license, there must be an **operating station** licensed to Barnwell. On April 12, 2001, the Station WBUB(AM) license was deleted, thereby causing any future city of license change on the part of WBAW-FM to result in the removal of Barnwell's sole local service. Obviously, since Bullie *currently* also operates a station licensed to Barnwell, Bullie, at least at *some* point in time shortly thereafter, must have become aware of the fact that not only was Station WBUB(AM) off the air, and that its license had been cancelled. It *also* was aware that the Commission was relying, at least in part, on WBUB(AM) continued existence, in its deliberations. See *Notice of Proposed Rulemaking*, DA 00-172 ¶ 2 (Chief, Policy and Rules Division 2000) (“Barnwell will continue to receive local service from AM station WBUB (formerly WMXG...”); *Nevertheless*, although Bullie was evidently put on notice of the *relevancy* of the WBUB's status, and was in

² Accord, *Sparta and Buckhead, GA*, 15 FCC Rcd 21536 (MMB 2000) (unbuilt construction permit); *Rugio and Taft, TX*, 14 FCC Rcd 11609 ¶ 3 (MMB 1999) (the Commission has defined "existing service" for change of community cases as "on air stations"); *Olney, Archer, Denison-Sherman and Azle, TX and Lawton, OK*, 13 FCC Rcd 18920, ¶ 4 (MMB 1998) (“we recognize that a removal of a sole local service...is not obviated by the allotment of a vacant channel”).

the best position to be *aware* of the changed fact, it failed to inform the Commission of the changed status of WBUB prior to the Commission's issuance of an *Order* in this proceeding. For Bullie to attempt to turn the burden around and fault *Multi-Service* for not bring the information to the Commission's attention previously (Opposition at 4) is questionable and disingenuous.³

As a participant in this proceeding, Multi-Service clearly has standing to request reconsideration of the precise result reached in this case. Bullie's attempts to obfuscate the issue notwithstanding, for Bullie to receive an unconditional grant of a change of city of license request is contrary to Commission policy, and contrary to the public interest. Both Commission policy and the public interest dictate that Station WBAW-FM remain licensed to Barnwell until such time as a new service is assigned to Barnwell and begins operation. Consequently, reconsideration of the decision of the Policy and Rules Division is warranted.

³ Contrary to Bullie's assertions and false characterization, Multi-Service did not "reserve the use of this information," engage in "selective use" of new information, or otherwise withhold information from the Commission's earlier attention. *Cf.* Opposition at 4. The information was filed as soon as it was brought to Multi-Services's attention.

Conversely, for the reasons stated above, in light of Bullie's actual knowledge of WBUB cessation of service, an open question exists concerning with Bullie intentionally withheld that information from the Commission to evade the very type of result dictated by the *Refugio* case.

WHEREFORE, it is respectfully requested that the Petition for Reconsideration filed by Multi-Service Corp be granted, and the Commission's upgrade and reallocation of Channel 256C3, Barnwell, South Carolina to Pembroke, Georgia as Channel 257C, be reversed or else conditioned on the activation of Channel 256C3 to Barnwell, South Carolina.

Respectfully submitted,

MULTI-SERVICE CORP.

By: 

Dan J. Alpert

Its Attorney

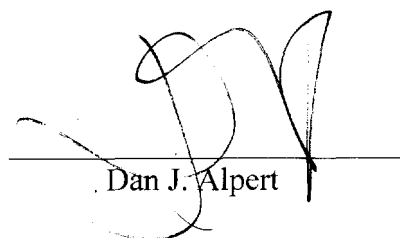
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November 30, 2001

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that the foregoing document has been sent to the following parties via First Class Mail, postage prepaid:

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